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7 **UNITED STATES DISTRICT COURT**
 8 **FOR THE DISTRICT OF ALASKA AT JUNEAU**

9 MYRNA I. JOHNSON,)
 10 Plaintiff,)
 11 vs.)
 12 FRED MEYER STORES, INC., and)
 13 JAIME SAN MIGUEL,)
 14 Defendants.) Case No. J-04-008 CV (RRB)

15 **PLAINTIFF'S OPPOSITION TO DEFENDANTS'**
 16 **MOTION TO EXCLUDE POTENTIAL EVIDENCE AT TRIAL**

17 Defendants FRED MEYER STORES, INC. and JAIME SAN MIGUEL ask this court
 18 to exclude certain admissible evidence and testimony. Specifically, Defendants ask the court to
 19 exclude the following evidence: (1) all proposed evidence regarding a "for cause" claim; (2)
 20 affidavits and other pre-trial statements made by Johnson's former Fred Meyer co-workers; (3)
 21 testimony regarding Plaintiff's work performance and character; (4) opinion testimony; (5)
 22 evidence regarding conduct of other employees; and (6) evidence regarding San Miguel's
 23 discriminatory practices, discriminatory intent and improper motives. Because this evidence is
 24 admissible, the court must deny Defendants' request.

25 **I. RELEVANT FACTS**

26 In 1992, Fred Meyer and Myrna Johnson entered into a for-cause employment
 27 agreement. Fred Meyer promised to provide Johnson with a career, offering her job security
 28 and increasing pay raises and promotions if Johnson performed her job well and met all
 29 enumerated, objective requirements for advancement within the Fred Meyer organization.

1 Throughout her employment, to induce her to devote the large quantities of time required to
2 become a manager, Fred Meyer made numerous representations to her, both orally and in
3 writing, that she would be treated fairly and consistently with its documented internal
4 disciplinary processes. Based on those promises, for almost a decade, Johnson committed
5 herself fully to her job at Fred Meyer. She progressed from an hourly, part-time employee to a
6 full-time, salaried management position working an average of 55 hours and up to 70 hours a
7 week.

8 In March of 2002, over a period of just six days, Johnson's career was terminated by the
9 actions of defendant Jaime San Miguel, her immediate supervisor, with the knowledge and
10 consent of Fred Meyer upper-level management. San Miguel wanted to replace Johnson with
11 Johnna Havard, a young, pretty, single woman. In order to remove Johnson from her position
12 as Lead Assistant, San Miguel needed to have her either terminated or demoted. He initiated a
13 sustained campaign of harassment against Johnson that culminated in an intimidating,
14 emotionally charged confrontation in a small room with two, large male supervisors.

15 First, San Miguel changed Johnson's schedule from the usual day shift to the less
16 desirable closing shift. Johnson had worked the closing shift for years as the Relief Assistant
17 Manager from 1996 to 2001, and one of the perks of being promoted to Lead Assistant was the
18 more desirable day shift hours. Upon Johnson's return to Fred Meyer after an emergency
19 leave, she was immediately put on the closing shift, and Havard was given Johnson's day shift
20 schedule.

21 Next, San Miguel increased Johnson's workload. All work is, of course, subject to
22 reasonable limitations based upon hours available for the tasks, number of tasks, individuals
23 available to work, etc. The main objective for the closing shift at Fred Meyer was "recovery"
24 (i.e., preparing the store for the next business day)—which was always a product of how much
25 time was available. Nonetheless, San Miguel tasked Johnson with additional projects,
26 including several long "tours" (i.e., lists of tasks expected to be completed) and a "planogram"
27 (i.e., setting up a merchandise display). He gave her long "daily tours" with lists of tasks he
28 expected to be completed each night. During that week, the store was frequently short-handed.
Absences of other members of the management team resulted in Johnson picking up additional
uncompleted management duties. In addition, Johnson struggled to keep the Apparel

1 Department operating during a “50% off” clearance sale in which her lead cashier was sick and
 2 her only back-up cashier, Julita Lim, had left for more than two hours for a prolonged dinner
 3 break with San Miguel. The record reflects that Johnson certainly spent an enormous amount
 4 of time at work that week, clocking in usually before 1:30 p.m. for a 2:00 p.m. shift, and
 leaving around midnight or later.

5 Third, San Miguel orchestrated a campaign of daily and unceasing oral and written
 6 complaints and harassment of unreasonable and unsupported criticisms regarding Johnson’s
 7 work. Among the voluminous policies and rules by which Johnson and all Fred Meyer
 8 employees’ performance are evaluated, include “recovery” standards (the appearance of
 9 clothing products on shelves and tables) and “planograms” (clear-cut charts or illustrations of
 10 desirable appearances of retail areas)—both of which are unarguably objective standards meant
 11 to maximize consistency in Fred Meyer’s retail operations. The purported reasons for San
 12 Miguel’s chief criticisms during the six-day period at issue were the store recoveries and a baby
 13 furniture planogram. Both complaints were pretextual.

14 Johnson was more than capable of performing quality recoveries. She had done so for
 15 years as the closing Relief Assistant Manager from 1996 to 2001. Her previous supervisor,
 16 Mathew Laney, described Johnson as someone who was an “excellent employee...led by
 17 example...was devoted to her job...completed her work in a timely manner...and always
 18 outworked her project list.” Several of Johnson’s fellow employees agree that her recoveries
 19 did not suddenly deteriorate or become sub-par that week. Johnna Havard, who was a trained
 20 Fred Meyer manager, testified that at the same time San Miguel was complaining about
 21 Johnson’s recoveries, anything she noticed was “minor”, “not an issue.” There was no
 22 difference between the recoveries after Johnson returned from leave as compared with the
 23 recoveries while she was on leave. Fred Meyer employee, Paz Carrillo has stated under oath
 24 that everything “was in order” at the close of business the previous day. Rhonda Cox, who was
 25 asked by San Miguel to report “secretly” to him about Johnson’s recoveries, stated that
 26 Johnson’s recovery was fine. Similarly, Sara Dexter stated that the Apparel department she
 27 was responsible for, “looked good” when she had arrived for the day shift on March 17, 2002.

28 Johnson also knew how to assemble planograms and had been doing so for years.
 Planograms and the display of merchandise in Fred Meyer stores is not something which is

1 dependent upon an individual manager's subjective opinions. In fact, Fred Meyer has a highly
2 detailed instruction manual in this regard titled the "Visual Merchandising Standards Manual"
3 (VMSM). Johnson was taught to follow the VMSM. Nonetheless, San Miguel stated he
4 wanted the baby furniture display done "differently" than what was called for in the planogram.
5 Johnson did her best to meet his deviation from standards, but since she was only trained in
6 following the VMSM and planogram instructions, and San Miguel did not adequately explain
7 what he expected, Johnson was never able to satisfy his demands despite repeated efforts. In
8 sum, San Miguel used his position as supervisor to browbeat and demoralize Johnson. In doing
9 so, he failed to follow the clear, objective standards and terms to which Johnson, and all Fred
Meyer employees, were trained and expected to adhere.

10 Fourth, San Miguel used his unsupported criticisms of Johnson's job performance as a
11 pretext for an advanced form of employee discipline. San Miguel set up an emotional
12 confrontation with Johnson trapped in a small, confined space with San Miguel and Fred
13 Sayre—both large men. In this meeting, San Miguel presented Johnson with a Written
14 "Employee Warning Notice." The Written Employee Warning Notice is a form of discipline
15 which normally occurs only after other progressive disciplinary steps have been taken--after the
16 passage of significantly more time than a week. Johnson was unaware that she had been
17 subject to any discipline—including "informal" stage discipline. When Johnson was presented
18 with the Written "Employee Warning Notice" on March 18, 2002, and was advised that she had
19 received a "Prior Verbal Warning" [checkbox is checked], she was caught completely off
20 guard. Overwhelmed with the impending potential loss of her career and the series of events
21 that had occurred over less than a week's time which had allowed San Miguel to accomplish
22 his nefarious objective despite Fred Meyer policies, Johnson began sobbing uncontrollably.
23 From her training and experience with Fred Meyer, she knew that was the final stage of
24 discipline before demotion, suspension or termination. Not only was she receiving the final
25 stage of discipline, she had apparently already gone through the earlier stages of discipline
26 without ever being aware that they had occurred. Given that Johnson had worked unceasingly
27 and uninterrupted, though unsuccessfully, for the prior six days to respond to San Miguel's
demoted.
28

1 Fifth, as Johnson sobbed uncontrollably, San Miguel demanded she sign the advanced
 2 form of discipline which threatened her removal from her position as Lead Assistant. While
 3 signing the form is not a requirement, San Miguel refused to give Johnson a copy unless she
 4 signed the form. Distraught, embarrassed, and humiliated, she told the men she had to leave
 5 the room, and did so in an effort to collect herself emotionally. As Johnson left the room to
 6 regain her composure, Sayre threatened that if she left the room, it would be considered a
 7 voluntary “walk off” from the job. Johnson, however, did not hear Sayre’s threats. Since there
 8 had been no informal discipline, and Johnson had worked unceasingly and unsuccessfully for
 9 the prior six straight days to respond to San Miguel’s escalating complaints, she knew that San
 10 Miguel was going to have her fired or demoted. Under these circumstances, Sayre’s threat was
 11 unfair and unreasonable.

12 Finally, while Johnson went downstairs to regain her composure in the Apparel stock
 13 room, San Miguel and Sayre took advantage of her absence and called the Portland
 14 headquarters for Fred Meyer. They then decided to describe Johnson’s tearful exodus from the
 15 room as a “walk-off” from the job and thus, a “voluntary termination.” The following day,
 16 after collecting herself emotionally, Johnson contacted Fred Meyer to learn to her surprise, that
 17 she had been terminated.

18 **II. JOHNSON’S CLAIMS AND POTENTIAL EVIDENCE**

19 Defendants’ adverse employment actions towards Johnson were based on improper
 20 motives and bad faith. Johnson was forced out of her job because San Miguel wanted to
 21 replace her with a younger, single, “more available,” and attractive woman, Johnna Havard.
 22 Next, when Johnson returned to Fred Meyer after taking emergency leave to take care of her
 23 daughter, Johnson informed San Miguel that she may need to take another leave of absence
 24 towards the end of the year if her daughter’s condition did not improve. San Miguel’s harsh
 25 and unrelenting campaign to orchestrate Johnson’s demotion or termination—just days after
 26 she returned from her emergency leave—was motivated by an unfair and unsupported
 27 presumption that Johnson was no longer reliable or dependable. Third, San Miguel’s sustained
 28 campaign in order to orchestrate Johnson’s demotion or termination, necessarily deprived
 Johnson of all the benefits of her employment contract with Fred Meyer, including the

1 progressive discipline process and ultimately, her continued employment, benefits, and her
2 "career" as a Fred Meyer manager.

3 A reasonable person would regard Defendants' actions toward Johnson as unfair. First,
4 Johnson, as a similarly situated employee, was held to a different standard and treated
5 differently than San Miguel. Unlike San Miguel, who was afforded constant allowances for his
6 behavior and conduct by his male supervisors (with whom he plays baseball and watches
7 football), Johnson was subjected to an advanced form of employee discipline and then
8 terminated for leaving an intimidating and emotionally charged confrontation. Second, San
9 Miguel deviated from well-established Fred Meyer objective standards and instead, held
10 Johnson to his own subjective standard in order to bombard her with an unrelenting campaign
11 of unsupported criticism and complaints. Third, San Miguel deviated from Fred Meyer's
12 progressive discipline policy, bypassing all informal methods of employee discipline and
13 moving directly to the Employee Written Warning. Fourth, Defendants' actions towards
14 Johnson were in violation of express public policy against harassment, age discrimination, sex
15 discrimination and retaliation for taking family medical leave. Finally, subjecting Johnson to a
16 pattern of harassing conduct, in and of itself, amounts to disparate treatment.

17 In support of these claims, Johnson intends to present the following into evidence:
18 Johnson's Fred Meyer employment file; employee appreciation cards addressed to Johnson;
19 Johnson's time report for the week of March 12, 2002; Fred Meyer Employee Warning Notice
20 to Johnson dated March 18, 2002; Daily task assignment sheets delegated to Johnson during the
21 week of March 12, 2002; Fred Meyer emails between San Miguel and Johnson during the week
22 of March 12, 2002; Fred Meyer Employee Handbook; Fred Meyer management training and
23 procedure manuals; Fred Meyer Corporate Handbook; complaints regarding San Miguel's work
24 performance and reliability; Fred Meyer investigation into complaints regarding San Miguel;
25 San Miguel's Fred Meyer employment file. In addition, Johnson will call most of the witnesses
26 who have previously provided affidavits in this matter to testify live at trial. In general, the
27 witnesses are expected to testify as to their personal knowledge in the following non-exclusive
28 areas:

- 29 • Representations made to them in the hiring and employment process by Fred Meyer as
30 to the nature of the employment contract;

- Representations made to them in the hiring and employment process by Fred Meyer as to the nature of the company's use of progressive discipline;
- Their training and experience in regards to the progressive discipline process used by Fred Meyer;
- Their training and experience in working with Johnson in the Apparel Department;
- Their training and experience in working closing shift, recovery and assembling planograms;
- Their observations of Johnson the week prior to her termination – her work efforts, concentration, attitude, diligence and quality of work performed based upon their training and experience; and
- Their observations of San Miguel and his actions which support the conclusion that he was motivated to terminate or demote Johnson for reasons other than her job performance.

Defendants ask the court to exclude the following evidence: (1) all proposed evidence regarding a “for cause” claim; (2) affidavits and other pre-trial statements made by Johnson’s former Fred Meyer co-workers; (3) testimony regarding Plaintiff’s work performance and character; (4) opinion testimony; (5) evidence regarding conduct of other employees; and (6) evidence regarding San Miguel’s discriminatory practices, discriminatory intent and improper motives.

III. DISCUSSION

A. Evidence regarding Plaintiff's "for cause" employment relationship with Fred Meyer is highly relevant and admissible

Defendants assert that Johnson’s wrongful discharge claim is limited because she was an “at-will” employee. Interestingly, Defendants make this assertion, and then ask the court to exclude all proposed evidence of Plaintiff’s “for cause” employment relationship with Fred Meyer. In making this request, Defendants argue that the covenant of good faith and fair dealing applies only to at-will employment relationships, and therefore, evidence that Johnson could only be terminated from her employment at Fred Meyer “for cause” is irrelevant.

1 “Rule 401 of the Federal Rules of Evidence contains a very expansive definition of
 2 relevant evidence.”¹ “Relevant evidence” is evidence “having *any* tendency to make the
 3 existence of any fact that is *of consequence* to the determination of the action more probable or
 4 less probable than it would be without the evidence.”² Relevancy is defined “as a relation
 5 between an item of evidence and a matter properly provable in the case.”³ “The fact to be
 6 proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is *of*
 7 *consequence* in the determination of the action.”⁴ Courts generally “let jurors see and hear
 8 even marginally relevant evidence, because [they] trust them to weigh the evidence
 9 appropriately.”⁵

10 Contrary to Defendants’ assertion, “The covenant of good faith and fair dealing is
 11 implied into *every* employment relationship . . . *even* in at-will employment contracts.”⁶ At a
 12 minimum, the covenant requires “that an employer not impair the right of an employee to
 13 receive the benefits of the employment agreement.”⁷ Under Alaska law, jurors can find a
 14 breach of the covenant of good faith and fair dealing if they find that “it is more likely true than
 15 not true that the defendant deprived the plaintiff of a benefit of the contract: (1) intentionally; or
 16 (2) by acting in a manner that a reasonable person would regard as unfair.”⁸

17 Companies, such as Fred Meyer, with the need to create a dedicated and skilled work
 18 force must offer something more to their workers than the promise that they can be terminated

18 ¹ *U.S. v. Curtis*, 568 F.2d 643, 645 (9th Cir. 1978).

19 ² F.R.E. 401 (emphasis added).

20 ³ Advisory Committee Notes to F.R.E. 401 (citing James, *Relevancy, Probability and the Law*, 29 Calif.L.Rev. 689, 696, n. 15 (1941), in *Selected Writings on Evidence and Trial* 610, 615, n. 15 (Fryer ed. 1957)).

21 ⁴ Advisory Committee Notes to F.R.E. 401.

22 ⁵ *U.S. v. Hitt*, 981 F.2d 422, 423 (9th Cir. 1992); *see also, U.S. v. Lemmon*, 5 F.3d 542 (9th Cir. 1993).

23 ⁶ *Eldridge v. FELEC Services, Inc.*, 920 F.2d 1434, (9th Cir. 1990) (interpreting and applying Alaska common law
 24 implied covenant of good faith and fair dealing) (emphasis added); *see also, Reed v. Municipality of Anchorage*,
 782 P.2d 1155, 1158 (Alaska 1989); *Mitford v. de Lasala*, 666 P.2d 1000, 1007 (Alaska 1983); *see also, Hammack v.*
 25 *Parker Drilling Co.*, 930 F.2d 27 (9th Cir. 1991).

26 ⁷ *Jones v. Central Peninsula General Hosp.*, 779 P.2d 783, 789 (Alaska 1989); *see also, Vinson v. City of Valdez*, 967
 27 F.2d 596 (9th Cir. 1992); *Mitford*, 666 P.2d at 1007; *Reed*, 782 P.2d at 1158.

28 ⁸ *See, Alaska Civil Pattern Jury Instruction 24.15.*

1 at any time for any reason, including a bad one. Accordingly, in the context of salaried
2 employees such as Johnson, Fred Meyer promises a career, expects and exacts enormous
3 efforts with the “career carrot” but if inconvenient, or for no good reason at all, demotes or
4 terminates that employee without consideration for whether there was “cause.” In order to
5 dupe its employees into this relationship, Fred Meyer specifically and intentionally avoids
6 advising employees, especially salaried employees, that Fred Meyer views their employment as
7 “at will.” Instead, Fred Meyer’s oral and written representations create the impression that
8 Fred Meyer employees are to be provided with certain job protections. It is simply unfair for
9 Fred Meyer to intentionally instill reasonable expectations of job security or dreams of a
“career” in the company, and then withdraw the basis for those expectations without cause.

10 As a result of Fred Meyer’s oral and written representations, Johnson had every
11 reasonable expectation that if she worked diligently and adhered to Fred Meyer policies and
12 procedures, she could expect a “career” in the Fred Meyer organization with certain
13 protections, including that she would only be disciplined, including demotion or termination,
14 according to Fred Meyer policies, practices and procedures. Because Defendants engaged in a
15 sustained campaign orchestrated to end with Johnson’s demotion or termination, Johnson was
16 necessarily deprived of all the benefits of her employment contract with Fred Meyer, including
17 the progressive discipline process and ultimately, her continued employment, benefits, and her
18 “career” as a Fred Meyer manager. Evidence regarding the “for cause” nature of Johnson’s
19 employment relationship underscores the unfairness of Defendants’ actions towards Johnson.
Accordingly, it is highly relevant to Johnson’s claims.

20 **B. Affidavits and other out-of-court statements from Plaintiff’s former Fred Meyer
21 co-workers may be admissible.**

22 Plaintiff has identified as potential exhibits at trial affidavits provided by several of
23 Plaintiff’s former Fred Meyer co-workers. Defendants ask the court to exclude these affidavits
24 and any other declarations of any witnesses. In making this blanket request for exclusion,
25 Defendants have not, however, identified any specific statements they find objectionable on
26 hearsay grounds.

1 Hearsay is testimony as to an out-of-court statement offered in court for the purpose of
 2 proving the truth of the matter asserted.⁹ While Plaintiff agrees that hearsay is generally
 3 inadmissible unless the statement falls into an exception of the hearsay rule, Defendants'
 4 request is improper for several reasons.

5 First, the court has already held that the admissibility of hearsay under pertinent
 6 exception must await trial.¹⁰ Nonetheless, Defendants have ignored this Court's ruling, and
 7 ask the court to make a sweeping evidentiary decision. In making this request, Defendants
 8 have not identified specific statements that they find objectionable. Instead, they have made a
 9 blanket request that includes a large amount of potentially admissible evidence. Accordingly,
 Defendants' request must be denied.

10 Second, not all pre-trial witness statements will be offered "for the truth of the matter
 11 asserted." Plaintiff's witness affidavits will be offered for the purpose of showing the existence
 12 of a comprehensive program of policies and practices by which Plaintiff had the right and
 13 reasonable expectation to be measured. Another purpose for presenting the co-worker
 14 affidavits is to illustrate the nature of employment at Fred Meyer—this helps illustrate the
 15 reasonableness of Plaintiff's reactions to Defendant San Miguel's repeated barrage of
 16 subjective criticism regarding her work performance and her emotional response when she was
 17 presented with a Written "Employee Warning Notice," which threatened removal from her
 managerial position.

18 Third, Plaintiff has identified as exhibits, only those affidavits and statements from
 19 witnesses she intends to call at trial. Evidence Rule 801(d)(1) states in relevant part, "A
 20 statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is
 21 subject to cross-examination concerning the statement, and the statement is (A)
 22 inconsistent with the declarant's testimony, and was given under oath subject to the
 23 penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B)
 24 consistent with the declarant's testimony and is offered to rebut an express or implied charge
 25 against the declarant of recent fabrication or improper influence or motive . . ." Accordingly,

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 27
 28⁹ F.R.E. 801(c).

¹⁰ Docket 82, *Order Denying Motions In Limine at Docket 47*, dated February 9, 2007.

1 pursuant to Evidence Rule 801(d)(1), affidavits signed by Plaintiff's former Fred Meyer co-
 2 workers may be admissible.

3 Finally, some of Plaintiff's co-worker affidavits contain statements which fall into
 4 exceptions to the hearsay rule. The events at issue in this case occurred several years ago. As a
 5 result, many of the witnesses may have difficulty remembering details regarding the events at
 6 issue. Pursuant to Evidence Rule 803(5), the contents of these affidavits will be admissible. In
 7 addition, many of the affidavits and declarations contain statements regarding Plaintiff's work
 8 ethic and reputation as a hard worker. Pursuant to Federal Evidence Rule 803(21), these
 9 statements are admissible as exceptions to the hearsay rule.

10 **C. Testimony regarding Plaintiff's work performance and reliability is admissible**

11 Defendants argue that testimony regarding Plaintiff's work performance and character
 12 is inadmissible and should be excluded. Defendants' arguments in this regard are strikingly
 13 similar, if not identical to arguments Defendants raised in their July 21, 2006 *Defendants'*
 14 *Omnibus Motions in Limine*.¹¹ These arguments, as a basis for excluding this potential
 15 evidence, have already been addressed by this Court. Specifically, on February 9, 2007, this
 16 court decided, "a final analysis of the witnesses' competence to testify, relevance, admissibility
 17 of hearsay under pertinent exception, appropriateness of alleged character evidence, the basis
 18 for witnesses' knowledge, and the potential for undue prejudice must await trial."¹² Despite
 19 this court's order, Defendants' arguments regarding the proposed evidence remain the same.

20 First, Defendants argue that Johnson and her co-workers are not competent to testify
 21 about Plaintiff's work performance. However, under the Federal Rules of Evidence, each of
 22 the witnesses Plaintiff intends to call to testify is competent to testify regarding his or her
 23 personal knowledge, unless otherwise provided by evidentiary rules.¹³ Fred Meyer is a
 24 standards-based business with explicit and detailed descriptions of how work is to be
 25 performed. Plaintiff and each of her former Fred Meyer co-workers have firsthand knowledge
 26 of Fred Meyer employment policies and practices, and several have knowledge of the extent to

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 28¹¹ Docket 47, *Defendants' Omnibus Motions in Limine*, dated July 31, 2007.

¹² Docket 82, *Order Denying Motions In Limine at Docket 47*, dated February 9, 2007.

¹³ F.R.E. 601 & 602.

1 which these policies and practices were followed in Johnson's case. Johnson and her witnesses
 2 will testify that Johnson's job performance in performing "recovery" and building a
 3 "planogram" were consistent with their training, experience and Fred Meyer's own written
 4 policies and procedures.

5 As lay witnesses, these witnesses' opinions are admissible if their testimony is
 6 rationally based on their own perceptions and would be helpful to the determination of the facts
 7 at issue.¹⁴ Plaintiff and her co-workers' opinions are rationally based on their own perceptions
 8 of Fred Meyer standards and criteria for recoveries and planograms, and of Plaintiff's job
 9 performance based on their experience and training. This testimony is helpful to illustrate how
 10 San Miguel deviated from Fred Meyer policies and procedures regarding recoveries and
 11 planograms, and it underscores the unfairness of Defendants' actions. While defense counsel
 12 may inquire as to the basis for these witness opinions, those opinions, nonetheless, are certainly
 13 relevant.

14 Defendants next argue that these witnesses' testimony should be excluded because,
 15 "[o]nly the opinions of the decision-makers are relevant."¹⁵ The cases cited by Defendants in
 16 support of this proposition do not establish such a broad rule. For example, in *Schuler v.*
 17 *Chronicle Broadcasting Co., Inc.*,¹⁶ the question before the Court was whether the plaintiff's
 18 subjective opinions about her own skills was enough to overcome the employer's assertions
 19 that she was less competent than competing applicants. This case does not support the
 20 defendants' broad attempt to prevent relevant evidence from being admitted in this matter.

21 The instant case clearly differs in that plaintiff and her former co-worker's testimony
 22 are not to be offered as subjective personal judgments or perception. Rather, Fred Meyer has
 23 comprehensive training manuals outlining objective criteria and standards for recoveries and
 24 planograms, making Plaintiff's witness testimony inherently less subjective and more reliable.
 25 As Fred Meyer employees and former employees, with training from Fred Meyer regarding the
 26 objective standards and criteria at issue in this case, Johnson and her former co-workers have

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 28¹⁴ F.R.E. 701.

¹⁵ Defendants' Motion to Exclude Potential Evidence at Trial at 4, filed September 10, 2007.

¹⁶ 793 F.2d 1010 (9th Cir. 1986).

1 extremely relevant testimony regarding Johnson's job performance. Johnson is certainly
2 qualified to discuss her training and experience in working with Fred Meyer. She's also
3 qualified to testify that the work she performed was consistent with that training and
4 experience. Similarly, Johnson's co-workers can testify as to their training and experience.
5 They can also testify as to their observations. It does not take a Fred Meyer "manager" to
6 determine whether the objective criteria for completing a "recovery" or a "planogram" were
7 completed. Someone who is trained, experienced and tasked with completing the work can
8 testify as to what they did and what they observed. This testimony is relevant to determine
9 whether, despite numerous volumes of Fred Meyer objective standards and criteria for
10 recoveries and planograms, and despite the fact that Plaintiff performed these duties for over 10
11 years without any problems, San Miguel had legitimate reasons for criticizing Johnson's
12 performance and then threatening Johnson with demotion or discharge if her performance did
13 not improve. Moreover, one of the very issues in this case is whether San Miguel's subjective
14 personal judgment regarding Johnson's performance of recoveries and planograms during the
15 six days after she returned, conformed to Fred Meyer's objective standards and criteria for
16 performing such tasks.

17 Finally, Defendants argue that Plaintiff's and her co-workers' testimony about
18 Plaintiff's work performance should be excluded because it is improper character evidence.
19 Evidence of a plaintiff's character, disposition, or personality may not be introduced to prove
20 that she acted in conformity with any of these personal characteristics.¹⁷ Because evidence of
21 Johnson's work performance and dependability is not offered to prove Johnson's character or
22 for the purpose that Johnson acted in conformity therewith, the testimony is not improper
23 character evidence. Instead, the subject testimony is relevant to establish that Johnson's
24 termination had nothing to do with her work performance. Plaintiff offers the evidence to assist
25 the court in determining whether San Miguel acted in accordance with Fred Meyer policies and
26 practices. The fact that Plaintiff offers evidence regarding first-hand observations of Johnson's
27 work performance and dependability does not convert otherwise relevant testimony into
28 improper character evidence.

¹⁷ F.R.E. 404(a).

D. Plaintiff's Fred Meyer co-workers' opinion testimony regarding Plaintiff's work performance and Fred Meyer policies, procedures and standards is admissible

Defendants attempt to exclude testimony of Plaintiff's Fred Meyer co-workers' opinions arguing, generally, that this testimony lacks foundation and is hearsay. As discussed above, Defendants raised identical arguments in their July 21, 2006 *Defendants' Omnibus Motions in Limine*,¹⁸ and this Court decided that a final analysis of this evidentiary issue must await trial.¹⁹

Disregarding this court’s decision, Defendants once again argue that Plaintiff’s former co-workers’ testimony regarding working conditions in the apparel department should be excluded because, “[o]nly the opinions of the decision-makers are relevant.”²⁰ As discussed in greater detail *supra*, the cases cited by Defendants in support of this proposition do not establish such a broad rule. Instead, evidence may be excluded when it lacks foundation in that the witness does not have personal knowledge of the matter. Personal knowledge may be established by the same witness’s own testimony.²¹ As lay witnesses, Plaintiff’s former Fred Meyer co-workers’ opinion testimony is admissible if it is rationally based on their own perceptions and would be helpful to the determination of the facts at issue.²² All of the co-workers expected to testify on Plaintiff’s behalf were employees at Fred Meyer when Plaintiff’s employment was terminated. They are competent to testify regarding their own observations and experiences. Each and every one is familiar with Fred Meyer policies and practices. Each was thoroughly trained by Fred Meyer on the objective standards and criteria for recoveries and planograms. The training and employment experiences of each of these witnesses—in addition to their own statements—clearly establish the foundational basis for their personal knowledge of the matters on which they will be asked to testify. Defendants’ arguments in this regard simply lack merit.

¹⁸ Docket 47, *Defendants' Omnibus Motions in Limine*, dated July 31, 2007.

¹⁹ Docket 82, *Order Denying Motions In Limine at Docket 47*, dated February 9, 2007.

²⁰ Defendants' Motion to Exclude Potential Evidence at Trial at 4, filed September 10, 2007.

21 F.R.E. 602

22 F.R.E. 701

E. Evidence regarding San Miguel's work performance is admissible

Plaintiff intends to present evidence regarding San Miguel's work performance, reliability, and attendance as a Fred Meyer manager. Defendants ask the court to exclude this evidence. They argue that this highly relevant evidence is prejudicial.

The objective aspect of the covenant of good faith and fair dealing requires that the employer act in a manner that a *reasonable person* would regard as fair.²³ The Alaska Supreme Court has previously explained that examples of objective breaches of the covenant of good faith and fair dealing would include disparate employee treatment, terminations on grounds that were unconstitutional, and firings that violated public policy.²⁴ An employer's failure to treat like employees alike can constitute a breach of the covenant.²⁵

The record demonstrates that Johnson was a very capable, hard-working employee. For years, San Miguel relied upon Johnson to work sixty-plus-hour weeks. Johnson was primarily responsible for keeping the apparel department floor operating. In contrast, San Miguel was not noted for being particularly hard-working or diligent. In fact, when San Miguel was going through a situation quite similar to Johnson's (i.e., his personal divorce), his attendance and work performance was erratic and inconsistent. He frequently had emotional outbreaks. He was unable to do his job. He frequently came into work late, and left work early. Throughout that time period, it was Johnson upon whom he relied. It was her ability and work ethic which kept the Apparel Department going, and which guaranteed that San Miguel's work was done when he was unable to do it himself. Notwithstanding this, there were no disciplinary consequences for San Miguel and Fred Meyer, instead, tolerated his erratic performance, attendance and emotional outbreaks.

Less than eight months later, Johnson went through similar personal problems requiring her to take an emergency leave. When she returned, she told San Miguel that she might have to leave again later in the year if her daughter remained in the Philippines and if her daughter's

²³ *Finch v. Greatland Foods, Inc.*, 21 P.3d 1282, 1286-87 (Alaska 2001); *Ramsey*, 936 P.2d at 133.

²⁴ *ERA Aviation, Inc. v. Seekins*, 973 P.2d 1137, 1139 (Alaska 1999); *Luedtke v. Nabors Drilling, Inc.* 834 P.2d 1220, 1224 (Alaska 1992) (Luedtke II).

²⁵ *Holland v. Union Oil Co. of Cal., Inc.*, 993 P.2d 1026, 1032 (Alaska 1999); *Belluomini v. Fred Meyer of Alaska, Inc.*, 993 P.2d 1009, 1012-13 (Alaska 1999); *Alaska Marine Pilots v. Hendsch*, 950 P.2d 98, 109 (Alaska 1997).

1 condition did not improve. Unlike San Miguel, who appears to have been afforded constant
 2 allowances for his behavior and conduct by his male supervisors (with whom he plays baseball
 3 and watches football), Johnson was subjected to an advanced form of employee discipline and
 4 then terminated for leaving an intimidating and emotionally charged confrontation.

5 Even after Johnson was discharged, Fred Meyer ignored San Miguel's attendance and
 6 work performance deficiencies. Specifically, despite numerous complaints by other Fred
 7 Meyer employees regarding San Miguel's excessive tardiness and absences, and an
 8 investigation into these documented complaints and recommendation for discipline by Mary
 9 Lucas, San Miguel's personnel file contains no record of that investigation or subsequent
 10 disciplinary action. None of these complaints were acted upon by management at Fred Meyer,
 11 and San Miguel retained his position as Apparel Manager. This history establishes that
 12 Johnson, as a similarly situated employee, was held to a different standard and treated
 13 differently. Accordingly, evidence of San Miguel's work performance is highly relevant to
 14 Johnson's claim of disparate treatment.

15 Johnson also claims that she was constructively discharged from her employment at
 16 Fred Meyer. To establish constructive discharge it is not necessary that the employee actually
 17 "prove that the employer acted with a specific intent of causing the employee to resign."²⁶
 18 Rather the employee "has the burden of showing that a reasonable person in the employee's
 19 position would have felt compelled to resign."²⁷ A constructive discharge may result from a
 20 "sustained campaign of harassment" against an employee.²⁸

21 Interestingly, after Johnson's employment was terminated, her replacement, Johnna
 22 Havard experienced an identical campaign of harassment by San Miguel. The parallels
 23 between San Miguel's treatment of Johnson and Johnson's replacement, Johnna Havard,
 24 demonstrate not only a course of improper conduct, in violation of the law, but also a method
 25 or *modus operandi* which San Miguel used when he wanted to remove someone from that
 26 position. Because Defendants claim that Johnson "walked off" the job, this evidence is highly

27 ²⁶ *Cameron v. Beard*, 864 P.2d 538, 547 (Alaska 1993).

28 ²⁷ *Cameron*, 864 P.2d at 547.

29 ²⁸ *Cameron*, 864 P.2d at 547.

1 relevant to Johnson's claim that she was constructively discharged. In addition, because
 2 subjecting Johnson to a pattern of harassing conduct could in and of itself amount to disparate
 3 treatment or violation of public policy in breach of the covenant of good faith and fair dealing,
 4 this evidence is highly relevant to support these claims as well.

5 **F. Evidence of San Miguel's improper motive and discriminatory intent is admissible**

6 Defendants ask this court to exclude all evidence regarding Plaintiff's dismissed claims.
 7 This, in essence, amounts to a request for this Court to exclude all evidence regarding San
 8 Miguel's improper motive and discriminatory intent. Because Defendants' motives and
 9 reasons for taking adverse employment actions and ultimately terminating Johnson's
 10 employment are pivotal issues in this case, evidence regarding San Miguel's discriminatory
 11 practices, discriminatory intent, and improper motive is highly relevant and admissible.

12 The subjective, "good faith" component of the covenant of good faith and fair dealing,
 13 prohibits an employer from "acting with a subjectively improper motive, *such as* when it
 14 'discharges an employee for the purpose of depriving him or her of one of the benefits of the
 15 contract.'"²⁹ The question is whether the employer's actions were "made in *bad faith*."³⁰

16 The evidence, which Defendants ask this court to exclude, demonstrates that San
 17 Miguel's motive for terminating Johnson's employment was improper and/or unlawful.
 18 Specifically, Johnson was forced out of her job because San Miguel wanted to replace her with
 19 Havard. The replacement of a ten-year proven employee with a young woman who worked
 20 less than a month, was motivated by a desire to replace the older worker with a younger one
 21 who may be "more available" to San Miguel. In this regard, there is extensive testimony by
 22 Havard and other employees of San Miguel's overt and unprofessional comments and actions
 23 towards young women. Plaintiff's argument here is not that Johnson was terminated simply
 24 because she was a woman, or because she was older. Rather, it is that when given the
 25 opportunity to put a younger, pretty and single worker in Johnson's position, San Miguel
 26 orchestrated Johnson's termination, effectively discriminating against her because of her age

27

 28²⁹ *Pitka*, 54 P.3d at 789 (citing *Era Aviation*, 973 P.2d at 1139; *Ramsey*, 936 P.2d at 133) (internal citations omitted)
 29 (emphasis added); *see also, Belluomini*, 993 P.2d at 1012.

30 *Pitka*, 54 P.3d at 789 (emphasis added).

1 and gender. The facts that San Miguel expressed a preference for “*someone young and*
 2 *beautiful*,” rather than “*a hag*” combined with Havard’s vocal desire to take over Johnson’s
 3 position, and then the fact that Havard was essentially “handed the job” immediately after
 4 Johnson’s discharge support this theory.

5 Next, this evidence has a tendency to show that Johnson was an important, valued Fred
 6 Meyer employee so long as she was absolutely reliable, and as soon as Johnson had to take
 7 leave to deal with her daughter’s problems, she was no longer viewed as a valuable member of
 8 the organization. When Johnson returned to Fred Meyer, she informed San Miguel that she
 9 may need to take another leave of absence towards the end of the year if her daughter’s
 10 condition did not improve. San Miguel’s harsh and unrelenting campaign to orchestrate
 11 Johnson’s demotion or termination—just days after she returned from her emergency leave—
 12 was motivated by an unfair decision to replace Johnson with someone he perceived as more
 13 available, more reliable and or more dependable. In effect, his conduct towards Johnson
 14 amounted to retaliation for her emergency leave—a breach of the covenant of good faith and
 15 fair dealing.

16 Because Defendants’ motives and intent are elements of Plaintiff’s claim, evidence of
 17 San Miguel’s discriminatory practices, discriminatory intent and improper motive are relevant
 18 and admissible. Accordingly, this Court must deny Defendants’ request.

19 IV. CONCLUSION

20 Defendants ask the court to exclude relevant, admissible evidence. The court must deny
 21 Defendants’ request for the following reasons: (1) evidence regarding the “for cause”
 22 employment relationship between Johnson and Fred Meyer is highly relevant to Defendants’
 23 defenses; (2) evidence regarding the “for cause” nature of Johnson’s employment relationship
 24 underscores the unfairness of Defendants’ actions towards Johnson and is, thus, highly relevant
 25 to Plaintiff’s claims; (3) affidavits and other out-of-court statements from Plaintiff’s former
 26 Fred Meyer co-workers may be admissible under Federal Evidence Rules 801(d)(1), 803(5),
 27 and 803(21), or other hearsay exceptions, and a blanket exclusion of this potentially admissible
 28 evidence is improper; (4) Plaintiff and her co-workers’ testimony regarding Plaintiff’s work
 performance and reliability is rationally based on the objective Fred Meyer standards and work

1 performance criteria; (5) because one of the issues in this case is whether San Miguel's
 2 subjective personal judgment regarding Johnson's performance of recoveries and planograms
 3 conformed to Fred Meyer's objective standards and criteria for performing such tasks, Plaintiff
 4 and her co-workers' testimony regarding Plaintiff's work performance and reliability is highly
 5 relevant and admissible; (6) as lay witnesses, Plaintiff's former Fred Meyer co-workers'
 6 opinion testimony is rationally based on their own perceptions and would be helpful to the
 7 determination of the facts at issue; (7) evidence regarding San Miguel's work performance as a
 8 Fred Meyer manager is highly relevant to Johnson's claims of disparate treatment and
 9 constructive discharge; and (8) because Defendants' motives and reasons for taking adverse
 10 employment actions and ultimately terminating Johnson's employment are pivotal issues in this
 11 case, evidence regarding San Miguel's discriminatory practices, discriminatory intent, and
 12 improper motive is highly relevant and admissible.

13 DATED this 20th day of September, 2007, at Juneau, Alaska.

14
 15 Respectfully submitted,
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PROOF OF SERVICE

STATE OF ALASKA, FIRST JUDICIAL DISTRICT AT JUNEAU

I am employed in the City and Borough of Juneau, State of Alaska. I am over the age of 18 and not a party to the within action. My business address is 424 N. Franklin Street, Juneau, AK 99801.

On September 20, 2007, I served the foregoing document described as *Plaintiff's Opposition to Motion to Exclude Potential Evidence at Trial*, on the interested parties in this action by serving the original true copies, addressed as follows:

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By mail, I deposited such envelope(s) in the mail at Juneau, Alaska, with postage thereon fully prepaid.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Juneau, Alaska, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

By personal service, I delivered such envelope(s) by hand to the office(s); the court box of the addressee(s).

By facsimile, I transmitted such documents from Juneau, Alaska, to the offices of the addressee(s).

By email, I transmitted such documents from Juneau, Alaska, to the email address of the addressee(s).

By electronic service through the court of record's electronic service system.

(State) I declare under penalty of perjury under the laws of the State of Alaska that the foregoing is true and correct.

(Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made.

Executed on September 20, 2007, at Juneau, Alaska.

s/ *Annya Ritchie*

CHOATE LAW FIRM LLC